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Supreme Court of the United States

OCTOBER TERM, 1959

No. 632

DEAN EJNARD BJORSON, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Supreme Court of the United States

OCTOBER TERM, 1959

No.

DEAN EJNARD BJORSON, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Northern District of California, Southern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition, *infra*, pages 14-25.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1959. (See Appendix B to this petition for writ of certiorari, *infra*, page 26.) The time for filing this petition for writ of certiorari was extended by an order of Mr. Justice Douglas dated December 5, 1959, to and including January 9, 1960. This petition for writ of certiorari is, therefore, filed within time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). (See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.) The district court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Whether the Court of Appeals interpreted the Act and the Regulations (that petitioner, a conscientious objector ordered to do civilian work, had failed to exhaust his administrative remedies because he did not go "to the brink" by reporting to the Los Angeles County Department of Charities as ordered to do so by his local board) contrary to the holding of this Court in *Dodez* v. *United States*, 329 U. S. 338, 342-343, 345, 347 (1946).

II.

Whether the appeal board denied the IV-F classification, without basis in fact contrary to Section 1622.44 of the Selective Service Regulations, resulting in the 1-O classification being arbitrary, capricious and contrary to law and making the final order to do civilian work void.

III.

Whether a waiver authorized by the Secretary of the Army, expressly limited to induction into the Armed Forces, may be construed to be a waiver as regards civilian employment in a municipal agency.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy." —June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the Universal Military Training and Service Act (62 Stat. 604, 612, 622; 65 Stat. 75, 86 (50 U. S. C. App. § 456(j))) is involved here. The pertinent part reads as follows:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sus-

tained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. * * * If after such hearing the Department of Justice finds that his objections are not sustained,

it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *"

Section 6(m) of the Universal Military Training and Service Act (50 U. S. C. App. § 456(m), as amended) provides:

"No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

Section 12 (a) of the Universal Military Training and Service Act (50 U. S. C. App. § 462 (a)) provides:

"* * * Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *."

Selective Service Regulation § 1622.44: Class IV-F: Physically, Mentally, or Morally Unfit.

"In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death

or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation."

Selective Service Regulation 1628.10: Who Will Be Examined.

"Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 3: Functions of Induction Stations.

"The primary functions of induction stations are to—

"a. Determine by examination which registrants meet the physical, mental, and moral standards for service in the Armed Forces."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 30f: Moral Standards (except as provided in par. 27e.).

"Information concerning court convictions of a registrant and whether he is in custody of the law will be indicated on DD Form 47, under item 14a and b.

More specific information concerning such an entry, especially with respect to personal background, the circumstances of the incident or incidents, and final disposition of charges will be obtained from the registrant at the induction station during the preinduction interview. If a waiver is granted under (1) or (2) below, a copy of the report of investigation on which waiver is predicated will be attached to the original copy of the induction record (DD Form 47)."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 10d(1).

"A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department . . .".

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 10c: Individuals ineligible for induction.

"Individuals listed below are ineligible for induction."

"Administrative Disqualifications.

"(1)(c) Registrants who fail to meet the prescribed moral standards indicated in d, above."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 14: Preparation and processing of records.

"b. DD Form 47. (1) Purpose. DD Form 47 is the official form for recording the results of the administrative records examination during the registrant's preinduction and induction processing. It is a basic personnel document in the files of the Armed Forces and Selective Service System."

STATEMENT OF THE CASE

Petitioner was charged by an indictment alleging that on or about October 21, 1957, he knowingly refused and failed to comply with the order of his Selective Service Local Board to report to said board "to be given instructions to proceed to a place of employment designated by said Local Board No. 30 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest," as provided in the Universal Military Training and Service Act and the rules and regulations made pursuant thereto. (TR 3-4)[1]

After pleading not guilty and waiving trial by jury, appellant was tried by the court on August 7, 1958. (TR 6-8) His entire Selective Service file was received in evidence as Plaintiff's Exhibit 1. (TR 19) It was stipulated that petitioner failed to report to his local board on October 21, 1957, as ordered. (TR 18) Petitioner was found guilty as charged on August 7, 1958 (TR 49), and was sentenced to imprisonment for one year on October 21, 1958. (TR 54)

Petitioner became eighteen years of age on May 2, 1950, and registered with his local board in Richmond, California, the same day. (F 1, 2)[2] On May 11, 1951, he completed his classification questionnaire in which he indicated, *inter alia*, that he had been an ordained minister of Jehovah's Witnesses since 1946, was then attending the Albany Theocratic Ministry School in Albany, California, that he had no business or employment "aside from Ministry," and certified that he was a conscientious objector. (F 6-11) His special form for conscientious objector was filed May 21, 1951. (F 12, 23-27) He was classified I-A by his local board on May 28, 1951. (F 12) In spite of a recommendation by the hearing officer that petitioner be granted conscientious

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[1] Numbers preceded by "TR" denote the applicable pages of the Transcript of Record filed in the court below.

[2] Numbers preceded by "F" appearing in parentheses herein refer to the pages of the Selective Service file (Plaintiff's Exhibit 1). Such page numbers, written in longhand, generally appear at the bottom of each page in the file.

objector status (F 37), the appeal board continued his 1-A classification on July 23, 1952. (F 12, 42)

Petitioner was subsequently classified IV-F for physical reasons from August, 1952, to July, 1953, at which time he was again classified I-A. (F 12, 44, 65-66) He refused to submit to induction as ordered in August, 1953 (F 12, 80, 82), and was subsequently tried and convicted of a felony based upon such refusal on February 19, 1954.[3] The late District Judge Edward P. Murphy sentenced petitioner to a fine of $2,000.00 and a two-year suspended sentence. (F 13, 99) On March 9, 1954, he was sentenced to two years' imprisonment for failure to pay said fine. (F 103)

Petitioner was classified IV-F by his local board on April 13, 1954, by reason of his conviction. (F 13) After serving ten and one-half months' imprisonment he was released on parole on February 27, 1955; his parole terminated April 7, 1956. (F 104, 149)

On June 27, 1956 (presumably at the request of the local board, although the file does not so indicate), the United States Army Recruiting Main Station in San Francisco, wrote to the Commanding General, Sixth Army, a "Request for Determination of *Eligibility for Induction*" concerning the petitioner herein.[4] (F 138-140) Item 14 of said request contains a statement by the investigating officer that petitioner was "Considered Acceptable for Military Service." (F 140)

The Commanding General, Sixth Army, by his Acting Assistant Adjutant General, recommended approval of said request in his first indorsement to the Adjutant General, Department of the Army in Washington, D. C. on June 28, 1956. (F 141)

The next persons to consider petitioner's eligibility for induction were those comprising the "Joint Induction Screening Group," as representatives of the Army, Air Force, Navy, and Marine Corps. All of said representatives

[3] *United States* v. *Bjorson*, United States District Court, Northern District of California, Southern Division, Criminal No. 33757.

[4] In this instance, as in all others in this petition, emphasis is supplied.

approved the aforesaid request on July 12, 1956. (F 136)

The Secretary of the Army formally approved the request for waiver of petitioner's previous conviction on July 13, 1956, in a second indorsement addressed to the Commanding General, Sixth Army. Said approval was couched in the following words:

> "1. Request for waiver of civil record is approved and *induction* into the *Armed Forces* (Army, Air Force, Navy or Marine Corps) is authorized provided otherwise qualified. This is *not* to be construed as authorization for *induction* into any *armed service* not currently accepting personnel for *induction*." (F 134)

The Commanding General, Sixth Army, forwarded this letter and the action of the Joint Induction Screening Group to the Army Recruiting District on July 19, 1956. (F 134) On July 20 the original investigating officer signed a certificate of acceptability, noting that petitioner had been "Found fully acceptable for *induction* into the *Armed Forces*." (F 167)

By August 21, 1956, petitioner was again classified I-A by his local board. (F 13) On August 28, 1956, he sent a letter requesting a personal appearance before the board. (F 170) Out of an abundance of caution he also wrote a separate letter requesting an appeal from said I-A classification on the same date. (F 169) The local board records note the receipt of both of these letters. (F 13) Following his personal appearance on September 11, 1956, at which time he presented a great deal of documentary evidence concerning his ministerial activities, petitioner was reclassified I-O by the local board. (F 13, 173-188)

On September 19, 1956, petitioner addressed a letter to his local board appealing his I-O classification. (F 198) The appeal board confirmed his I-O classification on July 18, 1957. (F 13, 213)

The local board forwarded SSS Form No. 152, special report for Class I-O registrants, to petitioner on July 25, 1957 (F 13, 213), *more than one year* after the Secretary

of the Army had considered and approved the request for determination of petitioner's eligibility for *induction* into the *Armed Forces*. Paragraph two of said special report mentions, for the first time since petitioner's registration in May of 1950, any requirement for *civilian work in lieu of induction*. (F 213) Petitioner returned this report, uncompleted, on August 5, 1957. (F 216)

On August 10, 1957, petitioner was given three choices of civilian work which he might perform. (F 219) He refused all of them on religious grounds. (F 220) At a subsequent meeting with members of the local board and the representative of the State Director, on September 16, 1958, the petitioner reaffirmed his position. (F 227-228) The *next day* the local board determined that employment as an institutional helper at the Los Angeles County Department of Charities would be appropriate for petitioner, and requested authority to order him to work there. (F 229) The Director of the Selective Service System approved this request on October 3, 1957. (F 234) The letter of transmittal of this authorization from that State Director to the local board reads in part as follows:

> "A copy of the letter of instructions to the registrant should be mailed *to the agency selected* at least four days in advance of the date set for the registrant to report to the office." (F 235)

The local board's order to report for civilian work, dated October 9, 1957, notified petitioner that he had been "assigned" to the Los Angeles County Department, and specified that he was to report to receive instructions on October 21. (F. 237) As previously mentioned, it was stipulated that the petitioner did not so report.

In the entire Selective Service file, there is only one document that indicated any action by the Los Angeles County Department of Charities. This is the statement of employer found on the bottom of the aforesaid order to report for civilian work. The only notation on this undated statement is the typewritten phrase "did not report." (F 239)

REASONS FOR GRANTING THE WRIT

I.

The opinion of the court below is out of harmony with and in direct conflict with the holding of this Court in *Dodez* v. *United States*, 329 U. S. 338, 342-343, 345, 347 (1946). The court below held that petitioner failed to go to the "brink." The court erroneously simulated the facts in this case to *Falbo* v. *United States*, 320 U. S. 549 (1944), whereas the facts are identical to the facts in *Dodez* v. *United States*, 329 U. S. 338 (1946). The Regulations involved in this case and the Regulations involved in *Dodez* v. *United States*, 329 U. S. 338 (1946), are substantially the same. They are identical insofar as the provision for no physical examination upon reporting for civilian work is concerned. The Regulations at the time of both cases contemplated a complete and final physical examination long prior to the issuance of the order to report for civilian work. No remedies of any kind or character remained, therefore, to be exhausted.

This case is entirely different from *Falbo* v. *United States*, 320 U. S. 549, 552-554 (1944), and is identical to *Dodez* v. *United States*, 329 U. S. 338, 342-343, 345, 347 (1946), which applied the doctrine of *Estep* v. *United States*, 327 U. S. 114, 115-116 (1946), but which the court below refused to follow.

The question presented here, whether the Court of Appeals erroneously interpreted the Regulations so as to require an illegal and vain act that would accomplish nothing in the way of exhausting administrative remedies, is of great public importance. There are hundreds of prosecutions under the criminal sanctions clause of the Act throughout the United States involving registrants who have refused to do civilian work and have also refused to report to their local boards or to the hospitals or other civilian work agencies. The law of the land that has been laid down by this Court in *Dodez* v. *United States*, 329 U. S.

338, 342-343, 345, 347 (1946), which authorizes defenses to be made under the criminal sanctions clause in circumstances identical to the facts of this case has been defied by the court below in its holding appearing in those parts of the opinion entitled "4. THE APPELLANT HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDY: HE MUST GO TO THE BRINK." and "CONCLUSION," where the court says "The appellant has failed to exhaust his administrative remedy."

In order to remove the discord from the law created by the holding of the court below in defiance of *Dodez* v. *United States*, 329 U. S. 338, 342-343, 345, 347 (1946), this Court should grant the petition for writ of certiorari.

II.

The other questions presented are of national importance. They involve substantially the same questions presented to this Court in *Korte* v. *United States*, No. 497, October Term, 1958, cert. denied 358 U. S. 928 (opinion below, 260 F. 2d 633 (9th Cir. 1958), affirming conviction by Northern District of California, Southern Division). In order to avoid a repetition of the argument made in the petition for writ of certiorari filed in the *Korte* case, the Court is respectfully referred to pages 9-14 of such petition (No. 497, October Term, 1958).

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

January, 1960.

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEAN EJNARD BJORSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 16,275

Nov. 18, 1959

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: BONE and HAMLEY, Circuit Judges, and ROSS, District Judge.

ROSS, District Judge,

I. STATEMENT OF THE CASE.

The appellant was indicted on May 1, 1958, for violation of Section 12(a) of the Universal Military Training and Service Act, 50 USCA App. 462(a), in that he knowingly refused to report to his Local Board to be given instructions to proceed to a place of employment for the purpose of doing civilian work contributing to the national health, safety, and interest. He pleaded not guilty, waived a jury trial, was found guilty by Judge Roche on August 7, 1958, and was sentenced to one year's imprisonment on October 15, 1958. It was stipulated that the appellant failed to re-

port to his Local Board on October 21, 1957, as ordered. This appeal is from that judgment of conviction.

2. STATEMENT OF FACTS.

The appellant became eighteen years of age on May 2, 1950, and registered with his Local Board in Richmond, California, the same day. On May 11, 1951, he completed his classification questionnaire in which he indicated, inter alia, that he had been an ordained minister of Jehovah's Witnesses since 1946; that he was then attending the Albany (California) Theocratic Ministry School; that he had no business or employment, "aside from Ministry", and that he was conscientiously opposed to participation in war in any form. He was classified I-A by his Local Board, and also by the Appeal Board, after his case had been referred to the Department of Justice for inquiry and hearing with respect to his conscientious-objector claim.

The appellant was subsequently classified 4-F for physical reasons, from August, 1952, to July, 1953.

The Local Board received a second medical Certificate of Acceptability in July, 1953, indicating that he was found fully acceptable for induction into the Armed Forces, and he was classified 1-A again. He refused to submit to induction as ordered, was indicted, tried, convicted, sentenced to pay a $2,000 fine, and given a two year suspended sentence. On March 9, 1954, he was sentenced to two years imprisonment on the basis of his refusal to pay the $2,000 fine.

The Local Board on April 13, 1954, classified the appellant as 4-F by reason of his conviction. After serving ten and one-half months imprisonment, he was released on parole on February 27, 1955. His parole terminated on April 7, 1956.

On May 24, 1956, the Local Board received a Dependency Questionnaire from the appellant, indicating that he had been employed by the American Supply Company, Berkeley, and was earning $80.00 a week.

On June 27, 1956, presumably at the request of the Local

Board—though the file does not so indicate—the United States Army Recruiting Main Station in San Francisco sent to the Commanding General of the Sixth Army a "Request for Determination of Eligibility for Induction" concerning the appellant. The request contained a statement by the investigating officer that the appellant was "Considered Acceptable for Military Service." The Commanding General recommended to the Adjutant General, Department of the Army, Washington, D. C., approval of the request on June 28, 1956.

On July 12, 1956, the Joint Induction Screening Group of the Department of the Army at Washington approved the request for a "moral waiver", and on the following day the Secretary of the Army formally approved the request for waiver of the appellant's prior conviction, in the following language:

> "1. Request for waiver of civil record is approved and induction into the Armed Forces (Army, Air Force, Navy or Marine Corps) is authorized provided otherwise qualified. This is not to be construed as authorization for induction into any armed service not currently accepting personnel for induction."

The Commanding General of the Sixth Army forwarded this letter and the action of the Joint Induction Screening Group to the Army Recruiting District on July 19, 1956.

On July 20, 1956, the original investigating officer signed a certificate of acceptability, noting that the appellant has been "Found fully acceptable for induction into the Armed Forces."

On August 21, 1956, the appellant was again classified I-A by his Local Board. According to the appellee, he took no appeal from this classification. On August 28, 1956, he sent a letter requesting a personal appearance before the Board; and on the same date he wrote a letter requesting an appeal from the 1-A classification. Following his personal appearance on September 11, 1956, at which time he

presented a great deal of documentary evidence concerning his ministerial activities, the appellant was reclassified 1-O by the Local Board.

On September 10, 1956, the Local Board received a report from the appellants' employer stating that the appellant worked an average of forty hours a week for the Supply Company, supra. An Occupational Questionnaire dated September 11, 1956, received by the Local Board, indicated that the appellant, according to his own statement at that time, was working forty hours a week for the Supply Company.

On September 21, 1956, the appellant appealed the classification 1-O, claiming to be a minister of religion. The appellant's case was for a second time referred to the Department of Justice for inquiry and hearing respecting the character and good faith of his conscientious objector claim.

On March 22, 1957, the Department of Justice recommended in a letter to the Appeal Board that the appellant be classified 1-O, which was done on July 18, 1957.

The Local Board forwarded SSS Form No. 152, special report for Class 1-O registrants, to the appellant on July 25, 1957, which the appellant stresses was "more than one year after the Secretary of the Army had considered and approved the request for determination of the appellant's eligibility for induction into the Armed Forces. Paragraph two of said special report mentions, for the first-time since the appellant's registration in May of 1950, any requirement for civilian work in lieu of induction." The appellant returned this report uncompleted, on August 5, 1957.

On August 10, 1957, the appellant was given three choices of civilian work that he was to perform. He refused all of them on "religious" grounds. At a subsequent meeting with members of the Local Board and the representative of the State Director of the Selective Service, on September 16, 1958, the appellant reaffirmed his position. The next day, the Local Board determined that employment as an institutional helper at the Los Angeles County Depart-

ment of Charities would be appropriate for the appellant, and requested authority to order him to work there. The Director of the Selective Service System approved this request on October 3, 1957. The letter of transmittal of this authorization from the State Director to the Local Board reads in part as follows:

> "A copy of the letter of instructions to the registrant should be mailed to the agency selected at least four days in advance of the date set for the registrant to report to the office."

The appellant's file contains the report of an interview with the appellant on September 16, 1957, at the Local Board, at which time the appellant stated that he could not accept any job offered by Selective Service in lieu of induction,[2] although he did admit that he was not a pioneer minister, and worked forty hours a week in secular employment.

On October 9, 1957, the appellant was ordered to report for civilian work to his Local Board, on October 21, 1957, to be given instructions to proceed to the Los Angeles County Department of Charities. As has already been stated, it was stipulated that the appellant did not so report.

The appellant seems to attach some importance to the concluding paragraph of his "Statement of the Case":

> "In the entire Selective Service file, there is only one document that indicated any action by the Los Angeles County Department of Charities. This is the statement of employer found on the bottom of the aforesaid order to report for civilian work. The only notation on this undated statement is the typewritten phrase 'DID NOT REPORT'."

The Court is at a loss as to why counsel regards the

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[2] In a letter to the Local Board on August 25, 1957, the appellant said that if he were to accept work prescribed by Selective Service, he would be serving two masters, and therefore could not accept any types of work offered.

above paragraph as worthy not only of bare inclusion, but of empliatic inclusion in a "Statement of the Case." It is incorporated in the Court's present statement for whatever comfort the appellant may derive from it.

2. THE APPELLANT'S ARGUMENT.

Section 6(m) of the Universal Military Training and Service Act does not provide for discretionary waivers of prior felony convictions by the Armed Forces or civilian agencies.

A waiver by the Secretary of the Army, expressly limited to induction into the Armed Forces, does not encompass civilian employment in a municipal agency.

A waiver of a prior felony conviction limited by its terms to induction into the Armed Forces cannot operate as a waiver for civilian employment in lieu of induction.

The appellant's 1-A classification on August 21, 1956, did not eliminate the necessity for a waiver applicable to service in lieu of induction.

The evidence produced at the trial was legally insufficient to support the judgment of guilty.

3. THE APPELLEE'S ARGUMENT.

The appellant has failed to exhaust his administrative remedy. The registrant must go to the "brink" of induction before he can raise any infirmity in his classification. In this case, the appellant was directed to report to the Local Board on October 21, 1957, to be given instructions to proceed to the Los Angeles County Department of Charities. The appellant did not appear at the Local Board, and, therefore, is in the same position as a registrant who does not appear at the Induction Station.

The appellant's proper classification on his release from imprisonment was 4-F. On August 21, 1956, however, the appellant was classified 1-A by his Local Board. If there was any error in stripping the appellant of his 4-F classification, it occurred when he was classified 1-A, and was

waived by his failure to appeal. In addition, the appellant further made clear this waiver by appealing his 1-O classification on the sole ground that he was a minister of religion. The orderly administration of the Selective Service laws prevents a registrant from bringing any flaw in his classification to the notice of the court trying him, where no hint of such infirmity was presented to the Local Boards.

The 4-F classification on conviction is not created for the benefit of the felon. This Court has held that where there has been a conviction of a felony, the exemption is permissible but not required. The 4-F classification permissible for a registrant is not created for his benefit, it is created for the benefit of the armed forces.

The whole strain of the appellant's argument that he was wrongly ordered to appear for service is a classic example of a man seeking to profit by his own wrong.

This Court has decided that the military authorities are entrusted with the task of selecting personnel to defend the United States, and if they believe that a registrant would not be suitable because of his prior felony conviction, they are not required to take him. They may, however, waive the disability and in such instances he may be inducted into the armed forces or assigned to work of national importance.

No further waiver, by the Los Angeles County Director of Charities, was necessary in this case.

4. THE APPELLANT HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDY: HE MUST GO TO THE "BRINK."

We have seen that the appellant was ordered to report for civilian work to his Local Board on October 21, 1957, to be given instructions to proceed to the Los Angeles County Department of Charities. It has been stipulated that he did not so report.

In other words, the appellant failed to exhaust his administrative remedies. He failed to go to the "brink."

In the leading case of Falbo v. United States, 1944, 320 U.S. 549, 552-554, the Court said:

"The registrant may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal, and thence, in certain circumstances, to the President. Only after he has exhausted this procedure is a protesting registrant ordered to report for service. If he has been classified for military service, his local board orders him to report for induction into the armed forces. If he has been classified a conscientious objector opposed to noncombatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. *In each case the registrant is under the same obligation to obey the order. But in neither case is the order to report the equivalent of acceptance for service.* Completion of the functions of the local board and appellate agencies, important as are those functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp. The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. *Thus a board order to report is no more than a necessary INTERMEDIATE step in a united and continuous process designed to raise an army speedily and efficiently.*

"In this process the local board is charged in the first instance with the duty to make the classification of registrants which Congress in its complete discretion saw fit to authorize. Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity

of the decision of the local board, it is certain that Congress was not required to provide for *judicial intervention before final acceptance of an individual for national service.* The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an *order directing a registrant to report FOR THE LAST STEP in the selective process.*

"*We think it has not.*"

(Emphasis supplied)

In Estep v. United States, 1946, 327 U.S. 114, 115-116, the Supreme Court put its own gloss upon the Falbo case, supra, pointing out that in the earlier case "we held that in a criminal prosecution . . . a registrant could not defend on the ground that he was wrongfully classified and was entitled to a statutory exemption, where the offense was a failure to report for induction into the armed forces or for work of national importance."

"We found," the Supreme Court continued, "no provision for judicial review of a registrant's classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services."

In Williams v. United States, 9 Cir., 1953, 203 F.2d 85, 88, certiorari denied, 1953, 345 U.S. 1003, we said:

"Furthermore, as the Supreme Court pointed out in Estep v. United States, supra, the Selective Service Act requires a selectee to come to the *brink* of induction before he may obtain a judicial review of his classification. Congress, in setting up the selective process, sought to avoid delays from *premature litigious interruption.* See Falbo v. United States, supra. Prior to the time when a selectee is found acceptable any injury resulting from the action of his Board has not materialized, since he might be rejected. But when the mo-

ment arrives to take the oath, administrative relief from injury to his constitutional rights is not available. He must then take the symbolic 'one step forward' which signifies that he has complied with all the steps in the selective process. *Only then will judicial review of an alleged violation of a selectee's constitutional rights by his Local Board be available.* (The Falbo case cited.) Appellant did not comply with all the steps in the selective process. *Therefore, he may not attack his classification or the Board's procedure.*" (Emphasis supplied.)[3]

5. THE 4-F CLASSIFICATION ON CONVICTION OF A FELONY IS NOT CREATED FOR THE BENEFIT OF THE REGISTANT-FELON, BUT FOR THE BENEFIT OF THE ARMED FORCES.

In the instant case, a convicted felon seems to be striving to profit from his own wrong. Perhaps he is laboring under the delusion that the Classification "4-F", in cases of this kind, is granted for the benefit of the criminal. The Court has already exploded such a fallacy.

In the recent case of Korte v. United States, 9 Cir., 1958, 260 F.2d 633, 637, certiorari denied, 1959, 358 U.S. 928, we used the following language:

> "We conclude that Section 6(m) of the Act (50 USCA Appendix, Section 456(m)) is not a *direction* on the part of Congress to *exempt* from training and service those persons convicted of felonies, but on the contrary is an injunction not to defer from training and service those persons who have been convicted of misdemeanors. *Where there has been a conviction of a felony, the exemption is PERMISSIBLE but is not REQUIRED. The IV-F classification permissible for a registrant is not created for his benefit, it is created for the benefit of the armed forces.* The military agen-

[3] See also United States v. Sutter, DC Cal., 1954, 127 F. Supp. 109, 117.

cies are entrusted with the task of selecting personnel to defend the United States, and if they believe a registrant would not be suitable because of his prior felony conviction, they are not required to take him. They may, however, waive the disability and in such instance he may be inducted into the armed forces or assigned to work of national importance." (Emphasis supplied)

6. THE EVIDENCE SUPPORTED THE JUDGMENT OF CONVICTION.

Finally, the appellant insists that "The evidence produced at the trial was legally insufficient to support the judgment." Despite this insistence, however, in his discussion of this point the appellant merely harks back to the claim of the lack of "any proper waiver by the Los Angeles County Department of Charities." We have fully discussed this subject of waiver, and need not repeat our comments here.

Nor is it necessary to dwell further on the sufficiency of the evidence. What we said in Shaw v. United States, 9 Cir., 1959, 264 F.2d 118, 120, is peculiarly applicable here:

> "In cases arising under the Universal Military Training and Service Act, as elsewhere in the law, an appellate court is not required to search the record with a microscope, in an effort to find minute but harmless flaws in the work of administrative bodies or of the lower courts. In the instant case, that is precisely what the appellant would have us do. In Witmer v. United States, 348 U.S. 375, at pages 380-381, 75 S.Ct. 392, 99 L Ed. 428, the Supreme Court has admonished us that 'It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determination. (Case cited.) The classification can be overturned only if it has no basis in fact.'"

7. CONCLUSION.

The appellant has failed to exhaust his administrative remedy. He did not report to his local board, to be given instructions to proceed to the Los Angeles County Department of Charities. He neglected to go to the "brink." He did not take "the last step."

The 4-F classification for conviction of a felony is not a loophole for the registrant-felon, but to keep convicted criminals out of the Armed Forces. This barrier, however, may be waived by the Armed Forces, but not by the ex-convict. In the instant case, the approval of the Secretary of the Army of the request "for waiver of civil record" in the appellant's case, was sufficient. No waiver by the Los Angeles County Department of Charities was necessary.

The evidence amply supports the judgment of conviction.

Accordingly, the judgment of the Court below is affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEAN EJNARD BJORSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 16275

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

Judgment filed and entered: November 18, 1959.



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MAR 31 1960
JAMES R. BROWNING, Clerk

No. 625.

In the Supreme Court of the United States

OCTOBER TERM, 1959.

DEAN ELIJAH ELKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 632

DEAN EJNARD BJORSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 60-70) is reported at 272 F. 2d 244.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1959 (R. 71). On December 5, 1959, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 9, 1960. The petition was filed on January 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, classified as a conscientious objector under the Selective Service System, failed to exhaust the administrative procedures by which a classification may be challenged.

2. Whether, in any event, petitioner was entitled to claim a IV-F classification on the basis of a prior felony conviction, where the local board had obtained waiver of objection by the armed forces before reclassifying petitioner from IV-F to I-A.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Universal Military Training and Service Act, and of the Selective Service Regulations and Army Special Regulations are set forth in the Appendix, *infra*, pp. 9-12.

STATEMENT

Petitioner seeks review of a judgment holding him guilty of refusal to comply with an order of the Selective Service Board, in violation of the Universal Military Training and Service Act, Sec. 12(a) (50 U.S.C. App. 462(a)) (R. 9-11). Sentence of one year imprisonment was imposed (R. 10).

Petitioner was classified IV-F on April 13, 1954, by reason of an earlier conviction for violation of the Act (R. 22). Upon release from prison in 1956, he obtained private employment at $80 per week (R. 23). On July 12, 1956, the Joint Induction Screening Group for the Armed Forces approved the Armed Forces Moral Waiver for Selective Service Registrants, and on July 20, 1956, the Adjutant General

endorsed the Moral Waiver for Induction with respect to petitioner, stating "Request for waiver of civil record is approved and induction into the Armed Forces is authorized" (R. 23).

Petitioner, after physical examination, was thereupon classified I-A (R. 23-24). On August 28, 1956, petitioner wrote to the board "in regards to an appeal from the classification of 1-A which I just received from your board and I am dissatisfied with such classification." The letter asserted only a claimed status "as a minister" of Jehovah's Witnesses, and no claim of IV-F status was alleged or suggested. (F. 169).[1] In a letter of the same date, petitioner requested a personal appearance before the board (F. 170). The record of this personal appearance, on September 11, 1956, discloses only a claim by petitioner for a ministry classification (R. 25-26; F. 193). Status as a minister was also asserted in a questionnaire and in numerous letters petitioner filed with the board. Petitioner's personal appearance disclosed work as a shipping clerk for 40 hours per week as against 20 to 30 hours devoted to his ministry (R. 25, F. 193).

On September 11, 1956, petitioner was reclassified I-O, as a conscientious objector (R. 26). On September 19, 1956, petitioner wrote letters concerning an appeal, referring only to his ministry claim and making no claim to IV-F classification (F. 198-200). Upon appeal, the showing of substantial employment

[1] The designation "F." refers to the Selective Service file, Plaintiff's Exhibit No. 1. The number refers to the number appearing at the bottom of each page of the file.

other than that of minister was verified and the appeal board classified petitioner I-O (R. 26-28).

Efforts, made in accordance with the selective service procedure, to obtain petitioner's designation of one of several types of civilian work which he would accept were unavailing (R. 28-31). On October 9, 1957, the local board sent a copy of Selective Service Form No. 153 to petitioner, notifying him that he had been assigned to institutional work at the Los Angeles County Department of Charities, and stating further (F. 243):

> You are ordered to report to the local board named above [at Richmond, California] at 8:30 a.m. on the 21st day of October, 1957, where you will be given instructions to proceed to the place of employment.
>
> You are ordered to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.
>
> You will be instructed as to your duties at the place of employment.
>
> Failure to report at the hour and on the day named in this order; or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both.

In the instructions with respect to the use of this form, it was specified that a further letter should be prepared for delivery to the registrant upon his appearance at the board, this letter to state the required

time and place for reporting at the place of civilian work. Four copies of the letter were to be sent to the prospective place of work four days in advance (F. 235), but copies of the Form No. 153 were not to be sent to the place of work until the registrant left the local board for the place of employment (F. 244). Petitioner failed to comply with the order to report to the board (R. 18). Accordingly, the two further steps in the administrative procedure, *i.e.*, the delivery of instructions to petitioner, and the mailing of Form No. 153 by the board to the place of work, never took place.

ARGUMENT

Petitioner's basic contention, as he recognizes (Pet. 13), is the same as that recently rejected in *Korte* v. *United States*, 260 F. 2d 633 (C.A. 9), certiorari denied, 358 U.S. 928. He argues that the possible moral unfitness to be deduced from his prior conviction and imprisonment resulted in permanent exemption, whereas the *Korte* case held that such a history merely affords a basis upon which the authorities could find him undesirable. We submit that the *Korte* decision is sound, since the statutory language relating to the exclusion of those formerly convicted of a felony is patently permissive and not mandatory; it is for the benefit of the armed services and civilian work agencies, not a grant of immunity to the registrant (see Sec. 6(m) *infra*, p. 9).[1a] Petitioner cites no decision in conflict with *Korte* and no

[1a] Over the years, the armed services have waived objections to persons convicted of various crimes in literally thousands of instances.

change of circumstance warranting review by this Court.[2]

Moreover, petitioner's contention is unavailable to him in that he failed to exhaust his administrative remedy by proper presentation of the contention upon appeal when the Selective Service Board took him out of the IV-F classification. If, as petitioner now contends, his former felony could not be waived, the board's reclassification on August 21, 1956, was invalid and petitioner was required to assert his IV-F claim by the available administrative appeal. He did not do so. Instead, he sought classification as a minister (IV-D), a classification which, under the regulations (Sec. 1623.2, *infra*, p. 11), was inconsistent with the claim for IV-F.[3]

There is another respect in which petitioner failed to complete the administrative procedure. Judicial review of a registrant's classification cannot take place before the registrant has "taken all the steps in the selective process" (*Estep* v. *United States*, 327 U.S. 114, 115-116; *Falbo* v. *United States*, 320 U.S. 549, 552-554). The typical manner of exhausting administrative procedure is illustrated by the case of a I-A registrant, who must proceed to the final induction point and there refuse to take the step forward which would mark the final step into service. Only then is there no further possibility of some new

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[2] See the Government's Brief in Opposition in *Korte* v. *United States*, *supra*, 358 U.S. 928, No. 497, O.T. 1958.

[3] The ministry claim, reasserted here but not argued, was clearly invalid in light of petitioner's admitted working hours elsewhere (*supra*, p. 3).

intervening event or personal disqualification or change in the board's orders.

Petitioner, as noted above, had been classified I-O, as a conscientious objector, with a duty to perform work at a civilian agency. He thereupon refused to take what was only a preliminary step—the appearance at the local board. At this appearance he would have received his instructions for proceeding, as a conscientious objector, to the place for civilian work. The preliminary order of October 9, 1957, to report to the board on October 21, was in no sense the end of the process. The date for commencement of the work was not specified in the order. Under the procedures, the copy of the order would not be sent to the work agency until petitioner had actually reported to the board (on October 21) and left the board at Richmond, California, en route to the agency at Los Angeles. The details of the proposed arrangements would be forwarded to the agency four days prior to October 21, but if the agency required a change of the proposed time, or if any other change of circumstances or disqualification intervened, the board, pursuant to the regulations, Sec. 1625.2, *infra*, pp. 11-12, could effect a change or postponement or even a reclassification when petitioner appeared at the board's headquarters.[4]

Petitioner's reliance on *Dodez* v. *United States*, 329 U.S. 338, ignores the fact that the procedure which

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[4] This consideration is the more pertinent here, where petitioner argues that he should have been rejected by the Los Angeles Department of Charities by reason of his unfitness.

prevailed in 1944, was different. As pointed out in *Johnston* v. *United States*, 351 U.S. 215, 222, "at the time of Dodez' breach, the Government delivered the conscientious objector registrants to the place of work. See Order to Report for Work, R. 155, No. 86, 1946 Term." Reporting to the local board could thus be the actual step into service.[5] Certainly, there is no conflict between the decision in *Dodez*, *supra*, and the decisions of this Court in *Falbo* and *Estep*, *supra*, followed by the court below. See *Williams* v. *United States*, 203 F. 2d 85, 88 (C.A. 9), certiorari denied, 345 U.S. 1003; *United States* v. *Sutter*, 127 F. Supp. 109, 117 (S.D. Cal.).

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1960.

[5] See the more extensive discussion of the differences in the earlier procedures involved in *Dodez* set forth in the Government's brief (pp. 23-30, 33, 34 fn. 12) in *Johnston*, *supra*, Nos. 643, 704, O.T. 1955.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Universal Military Training and Service Act, 62 Stat. 604, as amended:

> Sec. 6(h) [50 U.S.C. App. 456(h)]. * * * The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service * * * of any or all categories of those persons found to be physically, mentally, or morally deficient or defective. * * *
>
> Sec. 6(m) [50 U.S.C. App. 456(m)]. No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.
>
> Sec. 10(b)(3) [50 U.S.C. App. 460(b)(3)]. * * * The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * *
>
> * * * * *
>
> (7) [The President is authorized—] to prescribe eligibility, rules, and regulations governing the parole for service in the armed forces, or for any other special service established pursuant to this title of any person convicted of a violation of any of the provisions of this title;
>
> Sec. 12(a) [50 U.S.C. App. 462(a)]. Any * * * person * * * who otherwise evades or

refuses registration or service in the armed forces or any of the requirements of this title * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Selective Service Regulations (32 C.F.R.):

Sec. 1622.44. [E.O. 10659, 21 F.R. 1079] *Class IV-F: Physically, mentally, or morally unfit.* In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces * * *; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation.

Sec. 1623.2. [1954 Rev.] *Consideration of classes.* Every registrant shall be placed in Class I-A under the provisions of § 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class:

I-A-O	IV-A
I-O	IV-B
I-S	IV-C
II-A	IV-D
II-C	IV-F
II-S	V-A
I-D	I-W
III-A	I-C

Sec. 1625.2. [1958 Supp.] *When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not

be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

Department of the Army Special Regulations, approved 10 April 1953, SR 615-180-1, par. 10d(1):

A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department

* * *

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